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**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA**

ANGLEFIX TECH, LLC,

Plaintiff,

vs.

NUVASIVE, INC.,

Defendant.

CASE NO. 13-CV-983-BEN (RBB)

**ORDER DENYING MOTION FOR
JUDGMENT ON THE PLEADINGS**

[Docket No. 20]

Before this Court is a Motion for Judgment on the Pleadings filed by Defendant NuVasive, Inc. (Docket No. 20).

BACKGROUND

On April 24, 2013, Plaintiff AngleFix Tech, LLC (AngleFix) filed a Complaint alleging that NuVasive, Inc. (NuVasive) infringed U.S. Patent Number 6,955,677 ('677 Patent). The '677 Patent is entitled "Multi-angular Fastening Apparatus and Method for Surgical Bone Screw/plate Systems," and lists Laurence Dahners as the sole inventor. (Compl. ¶ 5). On July 8, 2013, NuVasive filed an Answer in which it asserted two counterclaims against AngleFix, seeking declaratory judgments of non-infringement, and of the invalidity and unenforceability of the '677 Patent. (Answer ¶¶ 161-167). AngleFix filed a Response on August 9, 2013. NuVasive filed the Motion for Judgment on the Pleadings on September 10, 2013.

This matter arises out of a patent for products used in orthopedic surgical procedures. AngleFix has not yet provided a technical introduction to the patent, but

1 the characterization of NuVasive is included for purposes of context. As described by
2 NuVasive, some spinal problems can be treated with a procedure in which a surgeon
3 removes an intervertebral disc, replaces it with bone, and immobilizes the spine to
4 allow bone to grow across the disc space. (*Id.* ¶ 43). The immobilization may be
5 achieved using a spinal fixation device. (*Id.*) Such devices include a metal plate
6 attached to the bone with screws that holds the vertebral bodies in the proper alignment
7 while the bone heals. (*Id.*) One challenge to such immobilization is the danger that the
8 screws will back out of the plate over time. (*Id.* ¶ 45). This can cause a number of
9 undesirable consequences, such as damage to the esophagus, nerve impingement, or
10 inhibition of the fusion process. (*Id.*)

11 LEGAL STANDARD

12 Pursuant to Federal Rule of Civil Procedure 12(b)(c), a party may move for
13 judgment on the pleadings “[a]fter the pleadings are closed—but early enough not to
14 delay trial.” A district court can render a judgment on the pleadings when the moving
15 party clearly establishes on the face of the pleadings that no material issue of fact
16 remains to be resolved, and that it is entitled to judgment as a matter of law. *Enron Oil*
17 *Trading & Trans. Co. v. Walbrook Ins. Co., Ltd.*, 132 F.3d 526, 529 (9th Cir. 1997)
18 (citations omitted). A motion for judgment on the pleadings is evaluated under the
19 same standard as a motion to dismiss brought pursuant to Rule 12(b)(6). *See id.*

20 A judgment on the pleadings is appropriate when, even if all the allegations in
21 the complaint are true, the moving party is entitled to judgment as a matter of law.
22 *Milne ex rel. Coyne v. Stephen Slesinger, Inc.*, 430 F.3d 1036, 1042 (9th Cir. 2005).
23 A plaintiff must allege “enough facts to state a claim to relief that is plausible on its
24 face.” *Lowden v. T-Mobile USA, Inc.*, 378 Fed. App’x 693, 694 (9th Cir. 2010)
25 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007)). The factual
26 allegations must raise “more than a sheer possibility that a defendant has acted
27 unlawfully.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Dismissal is appropriate if
28 the complaint fails to state enough facts to raise a reasonable expectation that discovery

1 will reveal evidence of the matter complained of, or if the complaint lacks a cognizable
2 legal theory under which relief may be granted. *Twombly*, 550 U.S. at 556.

3 DISCUSSION

4 NuVasive bases its motion on a single argument: that the admitted structure of
5 the accused product does not contain an external thread on the screw head, and that
6 each claim of the patent requires an external thread on the screw head. (Mot. at 2).

7 NuVasive's Motion must fail because its argument requires this Court to
8 construe key terms in the patent at the pleading stage. NuVasive's motion is explicitly
9 premised upon its construction of the claim to require that the external thread on the
10 screw head is required by each of the claims of the '677 Patent, and that the accused
11 products do not have such a "thread." (See Mot. at 2). AngleFix vigorously disputes
12 these constructions on several grounds. (Opp.) NuVasive is correct in stating that
13 claim construction is a question of law to be decided by the Court. *Markman v.*
14 *Westview Instruments, Inc.*, 517 U.S. 370, 384 (1996). However, construction of the
15 claims is not appropriate at this stage of the proceedings.

16 The Federal Circuit has addressed the inappropriateness of a court adopting a
17 narrow construction of the claim at the pleading stage, before a proper claim
18 construction hearing:

19 We agree with R+L that, to the extent the district court based its
20 assessment of the "reasonableness" of a given inference of infringement
21 on a narrow construction of the patent's claims, claim construction at the
22 pleading stage—with no claim construction processes undertaken—was
23 inappropriate . . . We afford the claims their broadest possible
24 construction at this stage of the proceedings.

25 *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1343
26 n.13 (Fed. Cir. 2012).

27 District courts have repeatedly held that if a court is required to construe the
28 meaning of claim terms and perform an infringement analysis in order to resolve a
motion to dismiss or motion for judgment on the pleadings, the motion should be
denied, because this type of analysis is inappropriate at the pleading stage. *Novartis*
Pharm. Corp. v. Actavis, Inc., No. 12-366, 2012 WL 6212619, at *7 (D. Del. Dec. 5,

2012) (citations omitted); *see also Butamax Adv. Biofuels LLC v. Gevo, Inc.*, No. 11-54-SLR, 2012 WL 2365905, at *1 (D. Del. June 21, 2012) (declining to grant motion for judgment on the pleadings where defendant asked court to embrace its characterization of patent and characterization of accused yeast strains as non-infringing); *Tech. Innovations, LLC v. Amazon.com, Inc.*, No. 11-690-SLR, 2012 WL 1441300, at *2 (D. Del. Apr. 25, 2012) (declining to engage in claim construction in resolving a Rule 12(b)(6) motion without the context provided by discovery and motion practice) (citations omitted); *Fujitsu Ltd. v. Belkin, Int'l, Inc.*, 782 F. Supp. 2d 868, 890 (N.D. Cal. 2011) (claim construction inappropriate on motion to dismiss because it undermines established rules for claim construction proceedings and often requires consideration of extrinsic evidence not normally considered at this stage); *Deston Therapeutics LLC v. Trigen Labs. Inc.*, 723 F. Supp. 2d 665, 670 (D. Del. 2010) (claim construction generally premature on motion to dismiss); *Yangaroo Inc. v. Destiny Media Techs. Inc.*, No. 09-C-462, 2009 WL 2836643, at *3 (E.D. Wis. Aug. 31, 2009) (motion to dismiss which required claim construction was inappropriate given the infancy of proceedings).

Review of the pleadings demonstrates that AngleFix has not conceded NuVasive's construction of the claims, and that claim construction will be required.

First, AngleFix clearly disputes NuVasive's assertion that there is no external thread on the accused product. (Opp. at 3-4). For instance, AngleFix asserted in its Response to NuVasive's counterclaims that "The lip portion of the Helix ACP screw is a thread." (Resp. ¶ 126). It also asserted that: "The head region of the bone screw in the Helix ACP product contains an external thread." (*Id.* ¶ 127). AngleFix argues in its Opposition to the Motion that it is still necessary to litigate the meaning of "thread" as used in the patent, and that a number of different structures that could satisfy the meaning of thread. (Opp. at 4). AngleFix argues that a thread can include "any single ridge that bends the protrusions," and that NuVasive has such a thread and protrusion design. (*Id.* at 9). It also points out that it will be the place of a judge or jury

1 to determine whether the NuVasive screw has a “thread” within the meaning of the
2 patent. (*Id.*)

3 Although NuVasive points to AngleFix’s concession of some historical facts
4 regarding “screws,” (Mot. at 3, 12-13), AngleFix argues that this does not have bearing
5 on whether NuVasive’s products are infringing, or upon the interpretation of the claim.
6 (Opp. at 5-6). AngleFix argues that such extrinsic evidence is to be relied upon in
7 construing claims only after the consideration of intrinsic evidence. (*Id.* at 6 (citing
8 *C.R. Bard, Inc. v. U.S. Surgical Corp.*, 388 F.3d 858, 862 (Fed. Cir. 2004))). It also
9 denies the applicability of other “screws,” such as common hardware screws, to the
10 interpretation of this patent. (*Id.* at 6). This Court will not resolve such arguments at
11 this time, as these arguments should be presented during claim construction.

12 AngleFix also disputes that each claim of the ’677 Patent requires an external
13 thread on the screw. (*Id.* at 4-5). It points to claims pertaining to metal plates with
14 holes, and argues that the sale of a bone plate alone, without screws, can be an act of
15 infringement. (*Id.* at 5). The question of whether each claim requires a screw with an
16 external thread is clearly in dispute, and will require proper claim construction.

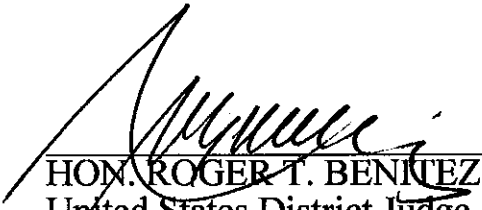
17 This Court will not engage in claim construction at this stage. The parties
18 vigorously dispute key elements of the patent claims, and this Court has not yet had the
19 benefit of a full briefing, in compliance with the established procedures for claim
20 construction, from both sides.

21 CONCLUSION

22 The Motion for Judgment on the Pleadings is **DENIED**.

23 **IT IS SO ORDERED.**

24
25 Dated: January 13 2014

26 
27 HON. ROGER T. BENITEZ
28 United States District Judge